No. 135

In the

Supreme Court of the United States

OCTOBER TERM, 1970

ORGANIZATION FOR A BETTER AUSTIN, et al.,
Petitioners,

vs.

JEROME M. KEEFE,
Respondent.

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

REPLY BRIEF FOR PETITIONERS

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The Scheffer Press, Inc.—ANdover 3-6850

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STATEMENT

This reply brief is submitted to place in proper perspective respondent's purported justifications of this injunction barring the distribution of literature by petitioners anywhere in Westchester, Illinois, and to correct certain of respondent's erroneous statements of Illinois laws.

ARGUMENT

I. RESPONDENT'S PURPORTED JUSTIFICATIONS PROVIDE NO BASIS FOR THIS INJUNCTION

For nearly three decades the freedom to distribute literature by hand to every citizen has been considered "so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." *Martin* v. *Struthers,* 319 U.S. 141, 146-147 (1943). It may be constitutionally permissible to prevent persons who distribute literature from blocking traffic on a crowded street, from denying passage to pedestrians who do not accept tendered leaflets and from "throwing literature broadcast in the streets." *Schneider* v. *State,* 308 U.S. 147, 160 (1939). A homeowner may ask a distributor of literature to leave his property. *Martin* v. *Struthers,* 319 U.S. at 147-149. Excessive noise may be regulated. *Kovacs* v. *Cooper,* 336 U.S. 77, 86-87 (1949). However, there is no basis for such regulation in the case at bar (see the findings of the trial court, A.69).

One who is criticized cannot defeat constitutional guarantees by recasting peaceful distribution of literature as an invasion of "privacy." Respondent's rhetoric about the invasion of his "sanctuary" (Respondent's Brief, p. 15; hereinafter "Resp. Br.") bears little relation to the facts of this case. He considers his private sanctuary to include the public streets and sidewalks of Westchester, its shopping centers and the doorsteps of all its residents. This is not the concept of privacy discussed in *Rowan* v. *United States Post Office,* 397 U.S. 728 (1970) (Resp. Br. 11). "Privacy" here is a cloak for censorship.

Nor may the presence of persons who are necessary for leaflet distribution be recast as "coercion."[1] Acceptance of such distorted and baseless characterizations would swallow up protected First Amendment activities. Moreover, the record and the trial court's findings contain nothing to support the proposition that neighbors or residents felt coerced by the distribution of the handbills. The distribution was peaceful and orderly, and did not precipitate any fights, disturbances or other breaches of the peace (A. 69). Respondent can only assert that "the distribution of these handbills apparently was the occasion for many conversations." (Resp. Br. 16).

The Constitution has never permitted the criticized to silence his critics. It has never permitted suburbs to become enclaves into which First Amendment activities may not intrude. This injunction, which sanctions such restrictions, "can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Martin* v. *Struthers,* 319 U.S. at 147.

II. PETITIONERS REMAIN SUBJECT TO THIS INJUNCTION

Respondent now, for the first time in the three years of proceedings in this case, suggests the injunction order against petitioners expired ten days after entry (Resp. Br. 7). Unfortunately, respondent's belated suggestion is contrary to both the facts and Illinois law, and petitioners continue to be subject to its restraint. A temporary or

[1] Similarly, respondent attempts to equate the distribution of literature with picketing (Resp. Br. 16-17). Respondent's sole authority for this proposition, *Hughes* v. *Superior Court,* 339 U.S. 460, 464-466 (1950), is to the contrary.

preliminary injunction in Illinois is binding until "dissolution or until the order granting it is reversed."[2] *Kessie v. Talcott*, 305 Ill. App. 627, 634, 27 N.E. 2d 857, 860 (2d Dist. 1940). The only exception of which petitioners are aware is in the case of a temporary restraining order issued without notice, which by statute expires after 10 days. Ill. Rev. Stat., Ch. 69, § 3-1 (1967). Indeed, the written injunction order here, which was entered after notice and a hearing, was not entered until 47 days after the conclusion of the hearing (A.16, 68). It continues in full force today.

III. THE OVERBREADTH OF THIS INJUNCTION IS PROPERLY BEFORE THE COURT

Respondent claims that petitioners cannot challenge the overbreadth of this injunction, at least with respect to the blanket prohibition on picketing, because petitioners purportedly did not present to the trial court a specific objection to the restraint against picketing (Resp. Br. 25). However, the record in this case shows that respondent argued waiver under Illinois law to the Appellate Court of Illinois (Brief of Plaintiff-Appellee, p. 19); but that court decided the overbreadth issue on the merits and held that the restraint on petitioners' activities was not overly broad (A.84-86). The constitutionality of this holding is clearly before the Court.

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[2] Illinois courts use the terms temporary, preliminary and interlocutory interchangeably in their reference to injunctions. Nichols Illinois Civil Practice, Vol. 3, § 2267.

CONCLUSION

For all the reasons stated above and in petitioners' initial brief, the injunction should be declared unconstitutional and dissolved.

Respectfully submitted,

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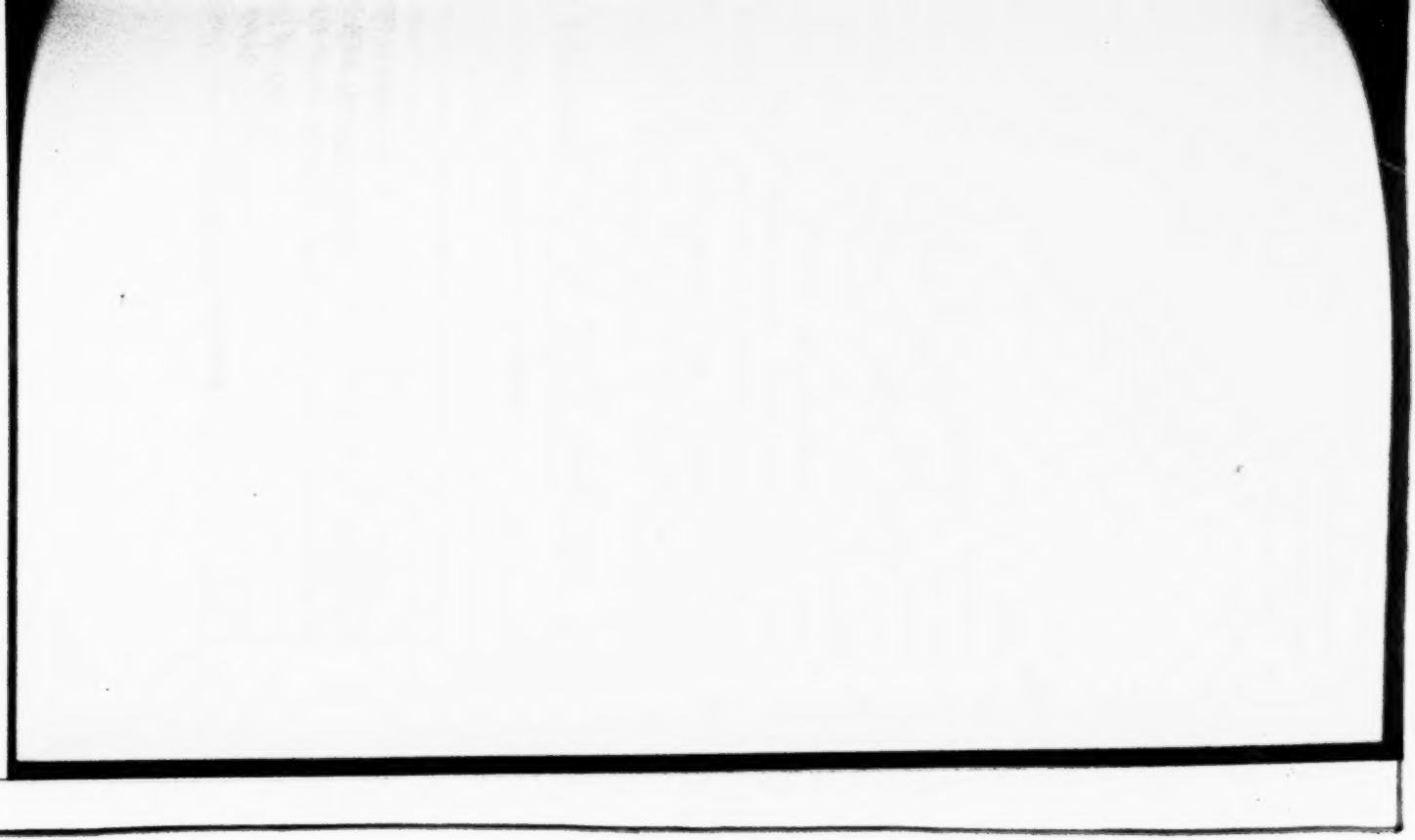

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Memo for petitioners, after argument, filed on Jan. 29, 1971
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Memo for respondent, after argument, filed on Feb. 3, 1971
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